

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 4, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-1242

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

COUNTY OF CRAWFORD,

Plaintiff-Respondent,

v.

JEFFERY A. WELSH,

Defendant-Appellant.

APPEAL from an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Affirmed.*

DYKMAN, J. This is a single-judge appeal decided pursuant to § 752.31(2)(c), STATS. Jeffery A. Welsh appeals from an order convicting him of one count of operating a motor vehicle while under the influence of an intoxicant (OMVWI), contrary to § 346.63(1)(a), STATS., and one count of operating a motor vehicle with a prohibited blood alcohol concentration (BAC), contrary to § 346.63(1)(b). Welsh asserts that the results of his blood alcohol concentration test must be suppressed because the results were not timely revealed to him. We conclude that we need not reach this issue because Welsh's conviction for OMVWI is adequately supported by the record and he has not

argued that without the evidence of his blood alcohol concentration, the remaining evidence was insufficient to support this conviction. Accordingly, we affirm.

The following facts are taken from Deputy Sheriff Tim Moran's incident report. Sometime between midnight and 1:30 a.m. on January 25, 1995, Deputy Moran was traveling south between Gays Mills and Bell Center when he was passed by a vehicle travelling north at eighty-six miles per hour. He turned around and gave chase. As he was approaching Gays Mills, he came upon a truck flipped over on the driver's side. The driver, Jeffery A. Welsh, was trying to get out of the truck. Deputy Moran noticed Welsh's bloodshot eyes and detected an odor of intoxicants on his breath. Welsh did not complain of injuries. Deputy Moran noticed that Welsh was unsteady on his feet, and asked him to do a few sobriety tests. Welsh agreed. Deputy Moran observed that Welsh did the tests poorly, and arrested him for OMVWI. Welsh told Deputy Moran that his leg was hurting, so Deputy Moran took him to a hospital where a blood sample was drawn.

The blood sample was tested the following day and revealed a blood alcohol concentration of .216%. Welsh moved to suppress the results of the test, which the trial court denied. He asserts that because he was not informed of the results of the blood alcohol test until long after the incident, he was deprived of the opportunity to have a second test guaranteed to him by § 343.305(4)(d), STATS.¹ He argues that since he has this right, he must be given an effective means to challenge false or inaccurate results of blood alcohol testing obtained by the police. He relies upon *Village of Oregon v. Bryant*, 188 Wis.2d 680, 691, 524 N.W.2d 635, 639 (1994), where the court said:

It is after the accused has been told and knows that he has tested in excess of a permitted BAC that he has the opportunity to have another test. Thus, at this post-initial testing juncture, the accused has been fully informed and knows that he will be administratively suspended because he has failed the first test. There

¹ Section 343.305(4)(d), STATS, provides: "After submitting to testing, the person tested has the right to have an additional test made by a person of his or her own choosing."

is no additional jeopardy threatened by asking for another test. The accused has absolutely nothing to lose.

Thus, according to Welsh, because he cannot immediately know the results of a blood test, he is denied his right to a second test. This, he claims, is a violation of due process of law.

But we need not consider whether the trial court should have suppressed the results of Welsh's blood alcohol concentration test because Welsh was convicted of both OMVWI and BAC. Even if the blood alcohol concentration test is suppressed, the OMVWI conviction remains. Though Welsh's blood alcohol content as revealed by the blood alcohol test is relevant to determine whether he is guilty of OMVWI, he has not argued that the absence of evidence of his blood alcohol content makes the total remaining evidence insufficient to support a conviction for OMVWI. We generally do not decide issues not raised on appeal. *Waushara County v. Graff*, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19, *cert. denied*, 506 U.S. 894 (1992). We, therefore, do not address this issue.

By the Court. – Order affirmed.

Not recommended for publication in the official reports. See RULE 809.23(1)(b)4, STATS.